Boston Mutual Life Insurance Company *and* Francis A. Thone. Case 1-CA-17993

January 28, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On September 18, 1981, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,[1] and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Boston Mutual Life Insurance Company, Methuen, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs, adequately present the issues and the positions of the parties.

[2] The Administrative Law Judge incorrectly attributed the statement that Charging Party Thone was "a pain in the the ass" to Respondent's vice president and regional sales director, John A. Topjian. The record testimony reveals that this statement was made by Regional Sales Manager Eugene D. DiPirro. In our view, this error does not undermine the ultimate finding that Respondent discharged Thone in violation of Sec. 8(a)(3) inasmuch as the Administrative Law Judge also found, and we agree, that Topjian also stated, in reference to Thone: "we have to get that bastard." Thus, the requisite finding of animus made by the Administrative Law Judge in reference to Topjian remains undisturbed.

In addition, Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980); *Castle Instant Maintenance/Maid, Inc.*, 256 NLRB 130 (1981); or *Limestone Apparel Corp.*, 255 NLRB 722 (1981). In his view, *Wright Line* and its progeny concern identifying the cause of discharge where a genuine lawful and a genuine unlawful reason exist. Where, as here, the asserted lawful reason is found to be a pretext, only one genuine reason remains—the unlawful one. Thus, the *Wright Line* analysis is not pertinent in cases such as this. See *Castle Instant Maintenance/Maid, supra.*

[3] In determining backpay liability, Member Jenkins would compute interest thereon in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: This case was heard before me on July 13-15, 1981, at Boston, Massachusetts.

Upon an original charge filed on October 24, 1980,[1] by Charging Party Thone, the Regional Director for Region 1 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on December 5.

In essence, the complaint alleges that the Employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), when, on or about April 24, it threatened to discharge Thone because of his concerted or union activities. Also, the complaint alleges that the Employer discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act by discharging Thone on May 8.

The Employer filed a timely answer which admitted certain matters but denied the substantive allegations and that it had committed any unfair labor practices.

All parties appeared at the hearing. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and meet material evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. Counsel for the Board's General Counsel and the Employer's counsel submitted post-trial briefs, the contents of which have been carefully considered.

Upon consideration of the entire record, the briefs, and my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Jurisdiction is uncontested. The Employer's answer admits, and I find it is, and at all material times has been, a Massachusetts corporation. The Employer maintains its principal office and place of business in Canton, Massachusetts, from which it is engaged in the retail sale and servicing of life insurance policies. The Employer maintains a number of regional offices. Only the regional office located at 240 Pleasant Street, Methuen, Massachusetts, is involved herein.

The Employer's total assets are in excess of $1 million and consist of cash, stocks, loans, and real estate located in Massachusetts and elsewhere. The Employer's annual premiums received exceed $500,000 of which premiums in excess of $50,000 are derived from outside Massachusetts. The Employer's annual gross revenues exceed $500,000.

[1] All dates hereinafter are 1980 unless otherwise stated.

Upon the foregoing, and the record as a whole, I find the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Based on the Employer's admission, and the record as a whole, I find that Insurance Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Thone's employment began on September 28, 1970. Throughout his employment, Thone was a debit insurance agent. It is undisputed Thone was discharged on May 8.

Thone's employment with the instant Employer was not continuous. It was interrupted twice, by a discharge and a suspension. Thus, on December 27, 1974, Thone was discharged after an audit uncovered a deficiency of $331.41 in his accounts. He was reinstated on February 10, 1975, at the Union's behest. Thereafter, Thone was suspended from May 27, 1977, through May 31, 1977, for insubordination.

Thone's employment was punctuated by a series of oral and written reprimands and warnings. Thus, on November 16, 1971, he was orally reprimanded for applying dividends to premiums without customer authorization.

When Thone was reinstated on February 10, 1975 (after his discharge), he received a written warning that "any further deficiency in your accounts or other violations of . . . rules and regulations will result in your immediate termination from the Company."

On March 15, 1977, Thone was orally reprimanded for failure timely to submit a case for lapsing.

On December 17, 1979, Thone received a written reprimand for failure to submit a policy for lapse. That reprimand warned "future violations may result in disciplinary action, up to and including suspension or termination."

On March 11, 1980, Thone was reprimanded in writing for failing timely to submit a case for lapse. He was warned "future violations will result in disciplinary action, up to and including suspension or termination."

During his employment, Thone was a member of Insurance Workers International Union, AFL-CIO (herein the Union). From approximately March 1975, Thone served as the Union's office chairman (hereafter called steward). He was the local Union's vice president since February 1978, and a member of its negotiating committee in January 1980.

The Employer and Union maintained a continuous collective-bargaining relationship covering the debit agents since 1953. The most recent collective-bargaining agreement between them is effective January 15, 1980, through January 14, 1982. Thone participated in the negotiations which culminated in that agreement.

Investigation and processing of grievances was part of Thone's steward duties. Additionally, Thone testified without contradiction, that the duties of that office entailed the "appraisal [sic] of the new agents and the senior agents of what protection they had under the contract that the Union had with the Company, and to assist them in whatever way I might to better understand their job, and be happy and successful in it."

Debit agents sell insurance policies and maintain collections of customers whose accounts appear in their collection books. They also are expected to prevent existing policies from lapsing, a process known as conservation.

At all material times, the Employer's relevant supervisory hierarchy was as follows: Roy G. Daniels, vice president and director of district agencies; John A. Topjian, vice president and regional sales director; Eugene D. DiPirro, regional sales manager; Donald Morrison, regional sales supervisor; and Thomas Stankard, staff (or sales) manager. All but Daniels and Topjian regularly were assigned to the Employer's Methuen office. The latter regularly worked at the Employer's Canton, Massachusetts, home office.

DiPirro's ascension to his position as regional manager at Methuen is relevant. He assumed that position in approximately June 1979. DiPirro's predecessor in that job was Raymond Longshaw, Jr. Longshaw was regional manager from at least December 27, 1974, until DiPirro replaced him. Jimmie Bletsis was regional manager before Longshaw. Thone testified, without contradiction, that he filed approximately 10 grievances.[2] One of them was filed with Longshaw and the others with DiPirro.

All grievances filed are submitted to Topjian, if not resolved within a district office, such as Methuen. Also, Daniels is made aware of grievances, although he is not directly involved in the grievance procedure.

Apparently, Thone's grievance activity accelerated in late 1979. The grievances, and their disposition, are outlined as follows:

(1) August 6, 1979: Grievance complained of unnecessary and uncompensated paperwork and threats of financial reprisal upon agents for what was claimed to be "company oversights." DiPirro denied the grievance. Topjian overruled DiPirro.

(2) December 17, 1979: Claimed that Thone was entitled to receive a commission upon business written by another debit agent, Schau. DiPirro denied the grievance. Topjian reversed the denial. The grievance was granted on January 28, 1980.

(3) February 6, 1980: Thone grieved that his staff manager had been discriminatory in that customers had been transferred from Thone's account book to the book of debit agents in other geographic areas but had not transferred accounts from other debit agents' books to Thone's when the customers became situated in the geographic area serviced by him. DiPirro did not respond to this grievance. It remained pending at Thone's discharge.

(4) March 20, 1980: Grieved that collection books of new agents were not "blocked" by the Employer in the usual manner. (To "block" a book requires marking each page to indicate the date to which a customer had paid at the time a new agent assumes responsibility for that particular collection book). DiPirro discussed this grievance with Thone. Both Thone and DiPirro recalled that Thone explicitly complained that agent Karen Green-

[2] Only five grievances appear in the record, as described *infra*.

berg's book was not blocked. DiPirro testified, without contradiction, that he immediately took corrective action.

(5) March 31, 1980: Thone grieved a written reprimand of March 11 from DiPirro. The warning was given purportedly because Thone neglected to timely submit a policy for lapsing. Thus, DiPirro warned Thone "future violations will result in disciplinary action, up to and including suspension or termination." This grievance remained pending at Thone's discharge.

The following are the facts leading to Thone's discharge.[3] On May 8 DiPirro delivered a letter dated May 6, signed by Daniels. The letter advised that Thone was discharged effective May 8 because he "falsified D.L.P.'s on M.D.O. dividend up-date requests."[4]

In effect, Thone was charged with having breached a fiduciary relationship with customers. By the asserted "falsification," the Employer contends Thone permitted use of policyholders' earned dividends without the policyholders' knowledge or authorization.[5]

Four options are available to policyholders regarding the application of their dividends. Those options are: (a) cash payment to policyholder; (b) used to pay premiums; (c) applied to acquire new policies; or (d) remain on deposit with the Employer, at interest. This fourth option also automatically authorizes the Employer to apply the dividend to overdue premium payments in order to prevent lapse.

Option (d) automatically applies to all policies. To exercise any of the other three options, a policyholder is required to sign a "Dividend Request" form.

Premium payments on MDO policies are due the first day of each month. If premiums are not paid on the first day of any particular month, and again not paid on the first of the following month, the policy is subject to lapse. Thus, on the 15th of the second consecutive month where timely premiums are not paid, and no dividends are available for application to premiums, the policy will be lapsed. If dividends are available for premium payment, a so-called M card is prepared by the debit agent servicing the customer's accounts.

The M card is the basis, *inter alia*, for application of dividends to premiums. The debit agent inserts the date of last payment. The M card is then submitted to the agent's staff manager in the district office. The cards are further submitted to a regional supervisor who, in turn, forwards them to the home office. There, the cards are processed. Authorization slips which indicate the amount of dividends available for application to premium payments are returned to the district office.

The events which directly led to Thone's discharge began on or about March 13. On that date, Stankard, then Thone's staff manager, had reviewed certain dividend authorization forms for some of Thone's accounts. He advised Thone of discrepancies he uncovered. Thus, Stankard told Thone that the dividends authorized exceeded the sum which appeared justified by Thone's account book.

M card requests for application of dividends to premiums require that only so much of accumulated dividends as are required to pay arrearages in premiums are initiated by the debit agents. The vice inherent in the discrepancies claimed by Stankard to exist had the effect of increasing Thone's compensation which, in part, was based on a percentage of collected premiums.

Stankard reported his findings to Morrison, then Thone's regional sales supervisor. Morrison compared the nine allegedly improper dividend authorizations to Thone's collection book. Morrison concluded that Stankard's report of apparent discrepancies was correct.

Morrison reported his findings to DePirro. Later, on March 13, DiPirro, in the presence of Morrison and Stankard, confronted Thone. DiPirro accused Thone of falsifying the dates of last payment on the dividend update requests, the M cards. Thone protested he did not believe he did so but, in any event, he commented to the effect that the situation presented no "big deal."[6] DiPirro told Thone his books would have to be audited.

Morrison was instructed to conduct the audit by DiPirro and Topjian. The nine customers whose accounts were involved were visited. Only one of the customers wanted the dividend applications reversed. Meanwhile, on March 21, DiPirro wrote Topjian. He recounted the confrontation with Thone over the nine incidents of apparent "falsification." The dividends had not yet actually been applied to the premium payments of those customers. Thus, DiPirro's March 31 report states, "I am not presently going to apply these dividends, as I believe by law we do not have the right to use them." DiPirro also informed Topjian that he counseled Thone concerning the "seriousness of . . . manipulating policyholders funds."

When Morrison completed the audit, he submitted a written report to DiPirro. In salient part, that report concludes:

> Audit shows agent Fran Thone . . . had a [sic] industrial shortage of $76.35 & a MDO overages of $115.59. *Mr. Thone has had a history of sloppy bookkeeping methods. It was next to impossible to verify DLP's in his collection book when compared to policyholders'* (——). Mr. Thone has many cases with blind advances as a result of Div. being paid and never being applied to the customer's PRB. Div. are not marked in red in the collection book and no markings indicate when the div. were applied. The adjustments of $76.35 industrial and $115.59 of MDO have been made on a form 87. The difference has been placed on a MDO overage coupon. [Emphasis supplied.]

[3] There is a plethora of evidence which describes the technical functions of debit agents, and the Employer's policies and operations in that connection. I shall allude only to that which is considered material and relevant.

[4] DLP refers to date of last payment of a premium. MDO is an abbreviation for monthly debit ordinary, which are policies on which customers make monthly premium payments.

[5] The analysis, *infra*, will assume the accuracy of the Employer's assertions. In view of this, and my findings based on that assumption, I conclude it is unnecessary to decide whether or not Thone's conduct actually was of the heinous nature claimed by the Employer.

[6] Both Thone and DiPirro recalled Thone's use of the quoted words.

Morrison's uncontradicted testimony reflects that DiPirro was present with him when he wrote his audit report and assisted him in doing so.[7]

On April 9, DiPirro forwarded the audit report to Topjian. DiPirro's cover letter also complained about Thone's performance in matters not involved in the audit. Thus, DiPirro enclosed a letter from customer MacDonald. DiPirro commented that Thone apparently caused MacDonald's policy to lapse improperly. In this connection, DiPirro stated, "I am sure that if necessary I could substantiate as many as 15 or 20 additional cases, identical to . . . [MacDonald's]."

DiPirro's April 9 submission also discusses customer Carbonneau whose business was lost, according to DiPirro, "due to Mr. Thone's poor business practices and lack of service." DiPirro noted, also, that Stankard "has had more than a dozen complaints over the past 2 months concerning Mr. Thone's refusal to provide service requested by policyholders, and clients who stated they do not want him to come to their house again because of his manners." DiPirro enclosed a sample of a page from Thone's collection book. This was enclosed to support DiPirro's claim that Thone "continues to operate in a manner not complying with Company procedures." In his April 9 submission to Topjian, DiPirro also indicated that Thone had received several letters of warning in the past from the Employer's management officials. DiPirro's April 9 letter also states Thone "is attempting to undermine our operation, especially with junior agents by making comments like 'as soon as you write your friends and relatives, the Company will get rid of you.'"

Finally, the April 9 letter recommended Thone's immediate termination.

Topjian forwarded DiPirro's April 9 letter, or a copy, to Daniels. Daniels was out of town on April 11, the date the letter was received in his office. No action was taken on the letter until approximately the last week in April. Then, Daniels discussed the contents of DiPirro's April 9 letter and decided to terminate Thone.[8]

Thone has not been recalled since his discharge.[9] It is undisputed that the commissions Thone would have realized from the "falsification" would have been approximately 30 cents a week for 13 weeks.

B. *Credibility*

Credibility of the respective witnesses is the foundational element for resolution of the alleged unlawful discharge threat. Moreover, witness credibility governs an understanding of the motivational factor necessary to support a *prima facie* case of discrimination.

The ultimate choice in resolving credibility issues and findings of fact is based on my observation of the demeanor of the witnesses, the weight of the respective evidence provided by them, established or admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole. *Northridge Knitting Mills, Inc.*, 223 NLRB 230 (1970); *Warren L. Rose Casting, Inc., d/b/a V & W Castings*, 231 NLRB 912 (1977); *Gold Standard Enterprises, Inc., et al.*, 234 NLRB 618 (1978).

Additionally, I have carefully weighed all the testimony, bearing in mind the general tendency of witnesses to testify as to their impressions or interpretations of what was said rather than attempting to give verbatim accounts.

In the credibility contest between the General Counsel's witnesses who testified as to what occurred during conversations with some of the Employer's officials and the witnesses presented by the Employer upon the same subject matter, a fair assessment of the testimony convinces me that the versions presented by the General Counsel's witnesses are the most reliable.

In addition to the above-described criteria used to resolve credibility, there are a number of objective factors contained in the record which aid in that regard. These factors follow:

1. Unrefuted testimony supports the credibility of Thone and Leland Greenberg

Thone testified that, in January or February, DiPirro "lectured" him on the duties of a steward. In particular, Thone testified that DiPirro admonished him not to look for things about which to file grievances.

DiPirro was asked to refute neither that he had a discussion involving the subject matter claimed by Thone nor that he even spoke to Thone in January or February. This aspect of Thone's testimony remains unrefuted.

Thone's testimony in this connection is plausible. He candidly acknowledged that he spoke with employees in pursuit of his steward's duties. (His description of those duties has been described hereinabove.) In this context, and in view of DiPirro's failure to rebut this aspect of Thone's testimony, I find it likely DiPirro would have "lectured" Thone as the latter described.[10]

Thone's rebuttal testimony further illuminates this matter. Thus, he candidly admitted that he told new agents that the Employer would terminate him as soon as they wrote policies on friends and relatives. This admission was made, though potentially detrimental to Thone. DiPirro had used those remarks of Thone to support the assertion to Topjian that Thone was disloyal and undermining the Employer to its employees. Thus, Thone's rebuttal testimony forms a plausible predicate for DiPirro to have "lectured" Thone, as claimed. I conclude that the totality of the above-described circumstances lends credence to Thone.

Leland Greenberg testified that he had a private conversation with DiPirro concerning Thone's steward activities. Thus, Greenberg stated that, on December 17, 1979, DiPirro asked him to speak with Thone and tell

[7] Morrison, without contradiction, testified that the underscored language of his report had been dictated by DiPirro. The effect of DiPirro's assistance will be discussed in the analysis section, *infra*.

[8] The Employer maintains no formal written rules or regulations regarding discipline. District managers possess, and have exercised, discharge authority. The usual practice when termination decisions are made is for district managers to request employees to resign. Daniels' participation in discharges was unusual. In 1978 he discharged one employee, in 1979 none, and in 1980 only one other prior to Thone.

[9] The Union filed and processed a grievance over the discharge. However, no arbitration has been pursued.

[10] This finding is buttressed by DiPirro's allusion to such activity in his April 9 letter to Topjian, a matter which will be further discussed *infra*.

him to "knock off the small b— going on familiarizing the new agents with procedures." Greenberg asserted that DiPirro said if Thone "didn't knock it off, that he'd be terminated." Further, Greenberg claimed he told DiPirro he could not terminate Thone for doing his job.[11] According to Greenberg, DiPirro responded, "We'll find a way. We can terminate him," and commented that Thone had a history of having problems with management and management was "gunning" for Thone.

DiPirro's account of the December 17 conversation is confusing. He recalled that he had a conversation with Greenberg which concerned Thone's actions in the office. However, DiPirro unequivocally denied he asked Greenberg to do anything to stop Thone's activity. Instead, DiPirro testified that Greenberg approached him and asked "if there was any way I [DiPirro] could quiet or slow Mr. Thone down in some" of his complaints because "he [Greenberg] was there to sell insurance and make money and didn't have the time to get involved in meetings and things of that nature."

DiPirro testified that he responded he could do nothing and invited Greenberg to take up the matter directly with Thone. Further, DiPirro denied he made any threat to terminate Thone during this conversation with Greenberg.

Interestingly, DiPirro was not asked to refute Greenberg's testimony that *Greenberg* commented to *DiPirro*, that he believed Thone could not be terminated for doing his job.

As a rebuttal witness, Greenberg denied initiating the December 17 conversation. Specifically, he denied the conversation began by asking DiPirro to slow Thone down.

As indicated, DiPirro's accounts of conversations with Leland Greenberg were confusing, at the very least. Indeed, such testimony may be perceived as an evasive tactic. This latter view stems from DiPirro's narration of another conversation Leland Greenberg claimed to have had with DiPirro in April 1980. The latter conversation is particularly critical. DiPirro is alleged to have made the unlawful discharge threat in violation of Section 8(a)(1) during the April discussion.

Thus, during his cross-examination, DiPirro testified that the conversation in which he claimed Greenberg asked him to slow down Thone occurred at the end of March or the beginning of April. However, when DiPirro was asked to recount what was said during that conversation his responses make it clear that he confused the substance of the conversation which he admitted he had privately with Leland Greenberg with another conversation which he further admitted was held with Greenberg and his wife.

Greenberg, his wife, and DiPirro all agreed they had a conversation at some time. As will be further described, *infra*, the Greenbergs corroborated each other regarding DiPirro's issuance of the unlawful discharge threat. DiPirro's acknowledgment that he spoke privately with Leland Greenberg when Greenberg is supposed to have asked to slow Thone down tends to confirm Greenberg's testimony that two conversations occurred—the first in December 1979 and the second in April 1980.[12] Greenberg presented comprehensive testimony concerning what was said at each of these meetings. On the other hand, DiPirro's testimony effectively obscures the issue of how many conversations occurred between him and Leland Greenberg.

Seen either as honest confusion or as not-so-subtle evasion, I conclude that these circumstances render DiPirro less reliable a witness than both Leland and Karen Greenberg.

Furthermore, I conclude that Leland Greenberg's account of the December 17 conversation is more reliable than DiPirro's for other reasons. First, the words attributed to DiPirro are consistent with Thone's testimony that he had been told to stop looking for material on which to file grievances. Second, I find it improbable that Greenberg would have complained about spending time in meetings, as DiPirro claimed. The record shows that Greenberg was a union activist. In fact, he replaced Thone as steward after Thone's discharge. It is difficult to imagine one who assumes such a position would be at all upset with the performance of the same union obligations he himself undertakes to perform.

Greenberg's and Thone's testimony regarding conversations they had with DiPirro become more convincing when examined in the light of Thone's description of a conversation he had with DiPirro on December 17, 1979. The two of them, according to Thone, discussed the grievance of the same date filed over Thone's claim that he was entitled to business written by agent Schau. Thone testified that DiPirro said if the grievances were not withdrawn, DiPirro "would basically 'get me' [Thone] on one thing or another." DiPirro acknowledged that they spoke concerning the grievance but denied that he threatened to "get" Thone.

I credit Thone. His description of what DiPirro said to him on December 17 is consistent with what Greenberg claimed DiPirro said to him the same date. It is plausible that Greenberg would have been told to have Thone "knock off the b—" and that if Thone did not do so, the Employer would find some way to terminate him virtually simultaneously with the request of Thone that he withdraw the Schau grievance or the Employer would "get" him.[13]

There exists yet another reason which makes Leland Greenberg's testimony more probable than DiPirro's. The record shows that DiPirro had become impatient with Thone's apparent acceleration in filing grievances. Thus, the grievances of August 6 and December 17, 1979, were answered by DiPirro within a day or two of filing. However, the grievances Thone filed on February 6 and March 31, 1980, went unanswered by DiPirro. I consider this circumstance some, but not dispositive, evidence of the likelihood that DiPirro made the April dis-

[11] Greenberg's comment apparently is a reference to the functions of a steward.

[12] The Employer's brief apparently concedes that two conversations occurred.

[13] The record does not show precisely the time elapsed between DiPirro's separate discussions with Thone and Greenberg on December 17 or which conversation preceded the other. However, I conclude that these omissions do not detract from the inherently consistent character of the two events.

charge threat (the explicit terms of which will be discussed *infra*) as related by Leland and Karen Greenberg.

It is more probable that Greenberg's purported observation of disbelief that Thone could be fired for doing his job as steward would be made by one who demonstrates such fealty to the Union.

Indeed, DiPirro's own testimony enhances the probability of Greenberg's. Thus, with regard to the March 20 grievance concerning the blocking of agents' books, DiPirro's testimony reflects that he was disturbed by Thone's having filed the grievance. Thus, DiPirro testified that he spoke with Thone after receiving the grievance. According to DiPirro, he told Thone that the grievance was a matter which Thone "could have come in and discussed with me . . . as a courtesy-type thing rather than take the time to file a grievance on it which I had to answer, and we [management] were absolutely wrong." DiPirro's testimony continued: He claimed Thone asked, "Are you saying I can't file grievances?" DiPirro claimed he responded, "No, I am not. You absolutely file one if you feel you have to." Nonetheless, DiPirro testified, "I just felt it was something that, if he [Thone] had mentioned, would have been done right away." (This last seemingly exculpatory remark does not diminish the general attitude with which I find DiPirro demonstrated a clear annoyance at Thone's grievance filings.)

Upon all the foregoing, I conclude that wherever conflicts exist between Leland and Karen Greenberg on one hand, and DiPirro on the other, the former two witnesses should be credited.

2. Crucial testimony of DiPirro

The crucial testimony of DiPirro was more vague than that of Leland and Karen Greenberg, and was adduced through leading questions. As noted above, the unlawful 8(a)(1) conduct is alleged to have occurred during the April conversation between DiPirro and the Greenbergs. I have already observed that DiPirro was confused and/or evasive regarding his conversations with Leland Greenberg.

Moreover, DiPirro's recollection was vague. He needed to be prompted by leading questions. When first recounting the contents of the April conversation, DiPirro testified that he could not remember how it started. However, DiPirro, consistent with both Greenbergs, acknowledged they spoke in his office. Nonetheless, during direct examination, DiPirro was asked the following leading question: "I think you said you were having a conversation with Greenberg who was standing in the door—" DiPirro responded (interrupting)," "Uh-huh." Thus, it was counsel, not DiPirro, who placed the conversation at his office door.

Additionally, it was counsel, not DiPirro, who indicated that Greenberg "brought up this question about is there anything that could be done about Mr. Thone [sic]." At first, DiPirro testified, "I don't really recall how it [the conversation] started."

Yet another attempt was made, during DiPirro's direct examination, to elicit a definitive response. DiPirro finally was asked, "Did Mr. Greenberg initiate a conversation with you about this complaint against Mr. Thone having falsified the DLP?" DiPirro answered, "Yes."

The above-described content of DiPirro's testimony makes it extremely difficult to place reliance upon his recollection. Indeed, his initial response indicated that he could not remember how the conversation started. In contrast, the Greenbergs, especially Leland, presented comprehensive, direct, sure, and spontaneous narrations of what occurred. Each was unshaken by cross-examination. Accordingly, I credit their accounts of the April conversation.[14]

3. The General Counsel's witnesses

The General Counsel's witnesses were corroborated by those of Respondent in positive terms and by the failure to refute their testimony. There are two areas where DiPirro presented testimony consistent with that of Thone and Greenberg. In isolation, these matters may seem insignificant. However, in the context of the vagueness of DiPirro's testimony, I conclude that such corroboration provides some added basis of reliance upon Thone and Greenberg.

Thone testified that when DiPirro confronted him in March with the DLP "falsification," he (Thone) commented that DiPirro should not make such a "big deal" out of it. When examined from the bench, DiPirro recalled that Thone had said "'Don't make a big deal out of it, or a big issue, one or the other." Seemingly, this bit of corroborative testimony is of little importance. However, witness credibility herein is a key factor in resolving the issues. Virtually every major area contains conflicting evidence from the opposing witnesses. The search for the truth must, therefore, be based on microscopic analysis.

I recognize that to conclude, as I do, that DiPirro has corroborated Thone is equally susceptible to the conclusion that Thone has corroborated DiPirro. However, it has already been demonstrated that DiPirro was vague, confused, and imprecise. Viewed in its totality, I find Thone's testimony internally consistent, inherently logical, forthright, precise, and comprehensive. These factors persuade me that the corroborative evidence should be utilized to enhance Thone's credibility.

As to corroboration of Leland Greenberg, when DiPirro finally unraveled his testimony concerning his conversation with Greenberg over the DLP "falsification," DiPirro claimed (consistent with Greenberg) that he referred to Thone's former disciplinary problems. Thus, DiPirro testified that he told Greenberg he could not overlook Thone's "situation." According to DiPirro, Greenberg asked him to "drop it."

In his testimony concerning the April conversation, Greenberg testified, in part, that DiPirro asked Greenberg to tell Thone to stop filing grievances or he would be terminated.

I credit Greenberg. The agreement between DiPirro and Greenberg that DiPirro referred to Thone's disciplinary history provides a logical sequence to Thone's narration. I have earlier noted that DiPirro was dis-

[14] The salient details appear below.

turbed over Thone's increased grievance filings. DiPirro had "lectured" Thone about them. Also, Greenberg's testimony regarding the April conversation is consistent with that of what occurred between him and DiPirro on December 17, 1979. In the earlier conversation, DiPirro warned that Thone would be terminated unless he discontinued familiarizing new agents with procedures.[15] Finally, I have noted that DiPirro expressed concern over Thone's grievance activity in his discussion regarding the March 20 grievance. At that time DiPirro himself testified that he would have preferred Thone to discuss the blocking of books with him on an informal basis.

In the foregoing backdrop, it is plausible that the April conversation occurred as described by Greenberg. DiPirro was armed with Thone's disciplinary history. Earlier, he had alluded to the plausibility that Thone might be again disciplined. DiPirro clearly was disturbed by Thone's grievance and other steward activity. In this context, I conclude that Greenberg's testimony to the effect that the April discharge threat actually was made by DiPirro flows out of logical progression from the prior events and the setting in which the April conversation occurred.

Even accepting DiPirro's testimony as true, the same result follows. Thus, assuming Greenberg actually asked DiPirro to "drop it," such a remark reasonably is a consequence of the alleged unlawful threat Greenberg attributed to DiPirro. Unless Greenberg had been confronted with some type of threat, the request to "drop it" has no predicate and is unexplained.

In another area I consider important, DiPirro made no effort to refute the testimony of the General Counsel's witness Morrison. As reported above, Morrison testified DiPirro helped him prepare the audit report. Specifically, the emphasized language appearing *supra*, was provided in the audit report by DiPirro. He was not asked to deny he had participated in the preparation of Morrison's audit report, as claimed by Morrison. The failure to attempt rebuttal of Morrison's testimony lends credence to his account.

4. Employer witness Daniels

Employer witness Daniels was self-contradictory and evasive. Although DiPirro recommended Thone's discharge in his April 9 letter to Topjian, it was Daniels who made the final decision and wrote the May 6 termination letter. During his direct examination, Daniels unequivocally denied knowledge of Thone's union activities. In this connection, he asserted without contradiction, that he is not directly involved in the grievance procedure. Nonetheless, Daniels acknowledged that he is made aware of grievances filed.

Later, during his testimony, Daniels admitted that, at the time he terminated Thone, he knew Thone was union steward at the Methuen office. Further, Daniels asserted that he discussed the Employer's reaction to the audit report with Topjian prior to the decision to terminate Thone. Daniels' testimony proceeded:

> Q. Did you know anything in detail about what he was doing as office chairman in the office?
>
> A. Not as office chairman.

Interestingly, Daniels was not then asked to be more specific. His direct examination did not return to the subject of Daniels' knowledge of what grievances might have been filed by Thone. Instead, Daniels' testimony ended with his unequivocal denial that he considered Thone's union activities in the decision to discharge.

I conclude the above discussion of Daniels' testimony contains a subtle self-contradiction which gives rise to a demonstrable effort to evade. Daniels' initial claim that he had no knowledge of Thone's union activity is directly contradicted by his admission that he was aware Thone was union steward. Also, Daniels' carefully phrased response that he was unaware of what Thone was doing "as office chairman" is contradictory to Daniels' practice of being advised of grievance filings. These contradictions, considered in the light of the predischarge discussions between Daniels and Topjian, render it difficult to believe Daniels was not apprised of *all* of Thone's activities. This is especially true because the Employer digressed from its normal termination practices in Thone's case.

The record reflects that the normal termination procedure does not involve Daniels. Customarily, district managers request employees to resign rather than be discharged. In the 2 years immediately preceding Thone's discharge, Daniels participated in the termination of only two others. If Thone's union activities had not been a consideration in Daniels' discharge decision it is unlikely he would have become involved in the instant case. Thus, I do not credit his unequivocal denial to the contrary.

5. Morrison's testimony

Morrison's testimony regarding Topjian's statements of animus is more plausible than Topjian's denial. Morrison testified, *inter alia*, that Topjian referred to Thone as a "pain in the a—" more than once since January 1980. DiPirro was not asked to deny he made these remarks.

Also, Morrison testified that Topjian spoke to him shortly before Morrison conducted the March audit over the alleged DLP "falsification." At that time, Topjian asked for a description of the M card procedures. During their conversation, according to Morrison, Topjian said, "We'll have to get this b— and we will."

Morrison's testimony was extensive and comprehensive. He appeared relaxed and testified in a forthright and direct manner. DiPirro's testimony was quite brief. He unequivocally denied telling Morrison the Employer would have to "get" Thone. However, as noted, Topjian did not seek to refute the reference to Thone as a "pain in the a—."

I credit Morrison's undenied testimony that Topjian had called Thone a "pain in the a—." Those references occurred as early as January 1980. The audit was conducted 2 months later. I find it plausible that Topjian said the Employer would "get this b—" at that time.

[15] The December remark is not alleged as a violation of the Act.

Such remark is the logical culmination of Topjian's view of Thone as a "pain in the a—."

The undisputed evidence makes it plausible that Topjian harbored the feelings and uttered the expressions attributed to him by Morrison. Thus, Topjian regularly was involved in grievance processing. Each of the grievances Thone filed reached Topjian. Twice, Topjian overruled DiPirro's denial of grievances filed by Thone (the August 6, 1979, and December 17, 1979, grievances). The three additional grievances filed by Thone in early 1980 also reached Topjian's attention.

I conclude that these events, coupled with Topjian's failure to deny he made the "pain in the a—" comment, lend credence to Morrison's testimony regarding what Topjian said to him. Accordingly, wherever conflicts exist in their testimony, I credit Morrison.

6. Conclusions

Apparent deficiencies in the testimony of the General Counsel's witnesses are insufficient to cause them to be discredited.

(a) Karen Greenberg testified that, on April 20, DiPirro spoke to her and Leland Greenberg. Karen (Leland's wife) recalled DiPirro said, "please tell Thone if he didn't stop filing grievances they'd find a way to get rid of him." Leland Greenberg testified that DiPirro displayed a "folder" and said "these are the problems we're having with him [Thone], and we have enough on him. We're going to get rid of him. He's caused enough trouble and we want him out, and you better tell him just to knock off all he's doing. Tell Thone to stop filing grievances or he'd be terminated."

The Employer argues that neither Karen nor Leland Greenberg should be credited. I have already discussed why I credit Leland over DiPirro.

As to Karen, the Employer claims the indisputable chronology vitiates reliance on her testimony. I disagree.

It is true, as the Employer observes, that DiPirro's discharge recommendation (April 9) preceded the conversation during which the Greenbergs claim DiPirro threatened Thone's discharge for filing grievances. The Employer argues it is implausible to believe the threat postdated the recommendation. In other circumstances, the Employer's contention might have merit. However, I find the chronology not inconsistent with other statements of DiPirro on April 20. Also, it is consistent with extrinsic events. Thus, Leland Greenberg's account shows DiPirro had asserted the Employer was "going to get rid of" Thone. I consider that statement an allusion, albeit not specific, to DiPirro's April 9 discharge recommendation. Also, I conclude the reference to the "problems" Thone was causing and the conclusion "he's caused enough trouble" to be expressions of DiPirro's own consternation over Thone's grievance activity.

Finally, the chronology shows that on April 20 no action yet had been taken by either Topjian or Daniels upon the discharge recommendation. In this context, I find it likely DiPirro would have asked that Thone be warned to "stop filing grievances" or suffer termination. I consider it unlikely that DiPirro would have announced his recommendation to the Greenbergs, his subordinate employees,[16] before his superiors acted on it. It is more reasonable that DiPirro would have said something, as I find he did, which would afford him a way to extricate himself from the possibility that his discharge recommendation were rejected, and to lay a foundation for a possible future discharge recommendation.

Karen Greenberg possibly might be discredited because she was patently evasive. In August 1980, the Employer discharged Leland Greenberg. The reason asserted was that he made misrepresentations to policyholders. Leland grieved his discharge into arbitration, filed unfair labor practice charges with the Board and a civil action against the Employer for slander. The arbitration, Board, and court proceedings were pending when Karen Greenberg testified.

On cross-examination, Karen Greenberg was asked the reason for Leland's discharge, whether or not policyholders complained to the Employer about Leland's activities, and whether the Employer conducted any investigation regarding her husband, and the precise location of their April 20 conversation with DiPirro. To each of these questions, Karen responded, "I don't recall."

Given the apparent notoriety attendant to Leland's discharge, I find it unreasonable to believe Karen actually had no recollection of the events relating to it. Clearly, she was evasive. Nonetheless, this evasive conduct does not warrant my disbelief of her total testimony. A trier of fact is not required to believe the entirety of a witness' testimony. *Maximum Precision Metal Products, Inc., Renault Stamping Ltd.*, 236 NLRB 1417 (1978).

As to the questions regarding her husband's discharge, Karen Greenberg's reluctance to provide candid responses is understandable, though I do not condone such testimonial demeanor. Her direct testimony was extremely brief. It was limited to a description of DiPirro's alleged unlawful discharge threat on April 20 and was presented to corroborate that of her husband. Counsel for the General Counsel interposed an objection, on relevance grounds, to the questions regarding the circumstances surrounding her husband's discharge. I overruled that objection based on my perception of apparent relevance to the credibility issue. Thus, the probity of such evidence was left for my evaluation at this time.

In the peculiar circumstances herein, I conclude the evasive responses to the questions relating to Leland's discharge do not detract from Karen Greenberg's overall credibility upon the subject matter of the April 20 conversation with DiPirro. The pendency of the arbitration, Board, and civil court actions reasonably has an inhibiting impact upon Karen. Moreover, those questions were not germane to her testimony concerning the issues before me. These factors clearly contributed to Karen's reticence.

I do not regard the failure to recall the location of the April 20 conversation so aggravated as to warrant rejection of Karen's otherwise credible testimony of what DiPirro said. Whether Karen stood outside or was in DiPirro's office is of little significance. What is more im-

[16] Karen started work for the Employer as a debit agent at the end of January or the beginning of February 1980. She remained employed there until around the beginning of June 1980.

portant is whether she heard what was said. No perceivable effort was made to test her on such matter.

Karen Greenberg did not narrate DiPirro's words *in haec verba* as her husband. Clearly, she testified to what she independently heard. The record reveals nothing to show her testimony had been rehearsed with her husband. I find her version of what DiPirro said substantially consistent with that of her husband, who has already been credited for reasons previously stated.

Upon all the foregoing, and all other discussion applicable to the April 20 conversation, I credit that aspect of Karen Greenberg's testimony and find that, on April 20, DiPirro, in the presence of both Greenbergs, said Thone would be discharged unless he stopped filing grievances.

(b) Leland Greenberg's credibility is challenged by the Employer on several grounds. Explicitly, the Employer submits that Greenberg is a hostile witness who sought refuge in the Act's protection to immunize himself from attack. The Employer contends Greenberg's self-interest in the pending arbitration, Board, and civil court actions provides the basis for him to be less than candid.[17] By implication, the Employer suggests the circumstances of Greenberg's own termination taint his testimonial assertions.

I agree that the Employer's arguments provide valid considerations in resolving credibility. However, I conclude that these factors, viewed in light of the record as a whole, do not diminish Greenberg's credibility.

First, I have earlier discussed some reasons Greenberg should be credited, *supra*. Second, Greenberg's account of the April 20 threat by DiPirro was credibly corroborated by his wife. Third, Greenberg's demeanor was impressive. He was forthright, direct, comprehensive, and precise. He was unshaken during cross-examination. Particularly, I noted no apparent hostility in his demeanor. The Employer has provided no transcript citations which objectively demonstrate the claimed hostility. Leland Greenberg testified pursuant to a subpena served upon him by the General Counsel.

In the above context, I conclude that the Employer's assertions relative to Greenberg's credibility are based on surmise and speculation. These formulations do not necessarily prove hostility. I decline to make credibility determinations based on such tenuous grounds when the other above-described sources are available. Accordingly, I reject these credibility arguments which the Employer propounds.

(c) As to Morrison, the Employer asserts his "image had been tarnished by his admission of his own, previously undisclosed, violations of his duty to the Company and its policyholders." Also, the Employer observes that Morrison sat in close proximity to Leland Greenberg and Thone throughout the hearing and his testimony shows "an eagerness" to cast his testimony in a light most favorable to Thone or adverse to the Employer.

The reference to Morrison's tarnished image apparently refers to his testimony that even he had "falsified" DLPs. That revelation was elicited by counsel for the General Counsel clearly to provide some evidence that the Employer treated Thone in a disparate manner. Morrison had not been subjected to any disciplinary action for his infraction. There is no evidence that the Employer was aware of Morrison's dereliction. In any event, as will be shown below, I do not base my decision on the merits upon a claim of disparate treatment.

Morrison's testimony does not taint his credibility. It shows no eagerness to slant it. Morrison simply responded to a legitimate area of inquiry by counsel for the General Counsel. He told what he knew. In this connection, there is evidence that debit agent Dubois had similarly placed incorrect DLPs on M cards. Dubois was not disciplined. There is evidence to justify the Employer's failure to act against Dubois. Nonetheless, Dubois' situation tends to show that Morrison was not fabricating evidence when he claimed he, too, had made incorrect DLP entries.

I place no significance in Morrison's choice of seats in the hearing room. He was a witness for the General Counsel. All such witnesses were more or less grouped together during the course of the hearing. This aspect of the Employer's challenge to Morrison has no merit.

The assertion that Morrison seemed eager to give testimony supporting the General Counsel's case is rejected. As previously noted, and as will be further demonstrated below, I consider Morrison's testimony regarding preparation of the audit report an important element of the General Counsel's *prima facie* case. In that area, the Employer made no effort to refute Morrison's testimony. Specifically, his assertions that the audit report contains references to Thone's work which were effectively inserted by DiPirro remain undenied. Such uncontradicted testimony belies this aspect of the attack upon Morrison's credibility.

Finally, the record shows that Morrison left his job with the Employer in August 1980 under disagreeable circumstances. Morrison had resigned, apparently voluntarily. However, he and Topjian then disagreed with Morrison's personal timetable for leaving. Morrison told DiPirro of his displeasure with Topjian. I find this incident an insufficient basis to discredit Morrison. I have assessed this circumstance against Morrison's general demeanor, his uncontradicted testimony, and all other factors discussed which relate to his credibility, and conclude that the record as a whole shows him to be a credible witness.

C. *Analysis*

1. Interference, restraint, and coercion

In complaint paragraph 8(a) it is alleged that, on or about April 24, DiPirro threatened employees with discharge for engaging in protected concerted or union activities.

As earlier observed, this allegation is based on DiPirro's April 20 statement to the Greenbergs to the effect Thone would be terminated unless he stopped filing grievances.

The Employer contends that there is no evidence that Thone had been engaged in conduct protected by the Act. The Employer argues at length that the evidence

[17] In this connection, it is self-evident that each Employer official who testified in its behalf is equally vulnerable to attack on grounds of self-interest.

herein does not show Thone's activity was designed to "attempt to induce, prepare for, or contemplate group action." Specifically, the Employer contends "Thone's contacts with group agents cannot be considered protected activity."[18]

I conclude that the Employer's arguments are misplaced. The General Counsel claims it is Thone's grievance filings and advice regarding the employees' collective-bargaining rights which comprise the requisite protected activity. It is well established that grievance filing is within the umbrella of the Act's protection. The underlying rationale of this principle is designed to promote the viability of collective bargaining. It assures employees of maximum benefits of their collective-bargaining agreement. E.g., *Crown Wrecking Co., Inc.*, 222 NLRB 958, 962-963 (1976). Indeed, the right to file grievances, and have them adjusted, is explicitly granted in Section 9(a) of the Act.

Arguably, the Employer is correct that the subject warnings given to new agents exceed permissible activity. The Supreme Court, in *N.L.R.B.* v. *Local Union No. 1229, International Brotherhood of Electrical Workers [Jefferson Standard Broadcasting Company]*, 346 U.S. 464, 472 (1953), stated, "There is no more elemental cause for discharge of an employee than disloyalty to his employer."

Thereafter, the Board has had occasion to consider types of employee conduct which might establish such disloyalty as to remove the conduct from the protection of the Act. In *Jeannette Corporation*, 217 NLRB 653 (1975), enfd. 532 F.2d 916 (3d Cir. 1976), the Board held that employees who breached confidential salary information in violation of their employer's rule were engaged in protected activity; in *Community Hospital of Roanoke Valley, Inc.*, 220 NLRB 217 (1975), enfd. 538 F.2d 607 (4th Cir. 1976), disparagement of an employer or its business activities were held protected; in *American Arbitration Association, Inc.*, 233 NLRB 71 (1977), the sending of letters and a questionnaire to the employer's clients concerning its dress code was held concerted activity, although the sarcastic and denigrating tone of the letters removed the employees from the Act's protection; and in *Automobile Club of Michigan, et al.*, 231 NLRB 1179 (1977), the Board agreed that an employee press release was defamatory but nonetheless held that the employees were engaged in protected activity. The Board concluded that the employer's remedy was a suit in defamation and not disciplinary action against the employees.

In *N.L.R.B.* v. *Circle Bindery, Inc.*, 536 F.2d 447, 452-453 (1st Cir. 1976), enfg. 218 NLRB 861 (1975), it was held that the fact the employer might lose business because of an employee's advice to his union that the employer was preparing a booklet which did not carry a union label did not render such conduct unprotected.

In the case at bar, I conclude that the warnings against writing policies on friends and agents reasonably are tantamount to legitimate advice regarding the employees' collective-bargaining rights and obligations. The parties' collective-bargaining agreement contains a quite broad reservation to the Employer (art. VII, discharge) regarding termination. In salient part, that clause retains in the Employer "full and complete power of discharge and discipline of all employees for just and sufficient cause . . ." with a grant to the Union of a privilege to arbitrate such matters.

The parties stipulated that the Employer maintains no rules and regulations governing employee conduct and discipline. In these circumstances, it is reasonable that a steward should be free to impart to the new agents his understandings and beliefs concerning possible discipline. To prevent such discussion effectively would undermine the Union's representational standing granted by the Act.

In my view, Thone's actions in this regard were not so indefensibly disloyal as to remove them from their protected character. Advising employees of their rights under a collective-bargaining agreement is an activity which the Act protects. In *Clara Barton Terrace Convalescent Center, etc.*, 225 NLRB 1028 (1976), a union official's letter, "abrupt or officious in tone," which protected grievance rights, was held within the Act's protection. Herein, I conclude Thone's advice to new agents was in furtherance of his duties which, in part and in his words, were the "appraisal [sic] of . . . what protection they had under the contract."

The sinister significance attached to Thone's warnings to the agents by DiPirro looms as a figment of DiPirro's apparent resolve to rid himself of Thone. The record shows that it was Stankard who reported to DiPirro that Thone was advising against writing policies for friends and relatives. DiPirro made only a shallow investigation. Thus, he contacted only one unidentified agent from whom he determined that Thone did give such advice. However, the interpretation which the Employer claims is objectionable strictly was DiPirro's. There is no evidence he made any effort whatsoever to confront Thone with his comments. Had he done so, he surely would have received the same explanation provided by Thone in the witness chair and which I have found to be reasonable.

Upon all the foregoing, I conclude that Thone's grievance filings and giving advice as steward to new agents constituted protected union activity.

The test for 8(a)(1) conduct is whether it reasonably tends to interfere with, restrain, and coerce employees in the exercise of their statutory rights. *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492 (1979), citing *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

The credited evidence shows, that on April 20, DiPirro said Thone would be discharged unless he stopped filing grievances. I conclude the clear meaning of those words imparts a threat of disciplinary action conditioned upon ending the activities found herein to be protected.

The remark was made to both Greenbergs, each of whom was employed by the instant Employer at the time.

No extensive analysis or discussion is necessary to demonstrate the coercive character of DiPirro's statement. Indisputably, it bears adversely upon employees' Section 7 rights. In the instant case, DiPirro's statement impedes the statutory and contractual right to file grievances and the general ability of Thone, as steward, to

[18] This is an apparent reference to the inclusion in DiPirro's April 9 letter of Thone's warnings to new agents that they would be terminated if they wrote business on friends and relatives.

communicate with the employees whom he represents on matters appropriate for maintenance of the stability of the collective-bargaining relationship. See *Ohio Ferro-Alloys Corporation*, 209 NLRB 577, 578 (1974); *Superior Motor Transportation Co., Inc.*, 200 NLRB 892, 893 (1972).

Accordingly, I find that the Employer violated Section 8(a)(1) of the Act as alleged in complaint paragraph 8(a).

2. Discrimination

In the aggregate, complaint paragraphs 9–13 allege that Thone's May 8 discharge and subsequent failure to be reinstated are discriminatory within the meaning of Section 8(a)(3) and (1) of the Act.

The Employer's position may be fairly summarized as follows: The Employer and the Union have maintained a long-standing collective-bargaining relationship void of evidence of union animus; none of the General Counsel's witnesses testified to any statement or other indicia of such animus; and the record shows that the alleged "falsification" which caused misapplication of policyholder funds was not a common practice among the agents. Thus, the Employer argues that Thone, by his misconduct, provoked his discharge. Affirmatively, the Employer pleads that "Thone was discharged for a record of offenses beginning in 1971" and culminating in the "falsification" of DLPs discovered in March 1980.

Both the General Counsel and the Employer submit that the instant case is not one which involves a so-called dual motive. In any event, the Employer argues that the evidence has sufficiently rebutted any *prima facie* case which may have been established by the General Counsel.

In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board declared that in dual motive cases the General Counsel must first prove the existence of a *prima facie* case showing that the alleged discrimination was motivated by antiunion considerations. Thereafter, the burden of proof shifts to Respondent to demonstrate it would have taken the action alleged as discriminatory even in the absence of the employees' protected activity. The test of causality applied by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), was adopted by the Board.

Recently, the Board has indicated the same test may apply to so-called "pretext" cases. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). See also *Castle Instant Maintenance/Maid, Inc.*, 256 NLRB 130 (1981).

In *Quality Broadcasting Corp. of San Juan d/b/a WQBS—AM Radio Station "La Gran Cadena,"* 254 NLRB 960 (1981), the Board reconsidered its Decision and Order in 241 NLRB 318 (1979), in the light of various relevant decisions of the First Circuit Court of Appeals which had jurisdiction over the subject matter involved in *Quality Broadcasting*. Specifically, the First Circuit addressed the issue of the element of motivation requisite to the General Counsel's *prima facie* case of alleged discrimination under the Act. Thus, the Board took cognizance of *N.L.R.B.* v. *Eastern Smelting and Refining Corporation*, 598 F.2d 666 (1979); *Liberty Mutual Insurance Company* v. *N.L.R.B.*, 592 F.2d 595 (1979); *Coletti's Furniture, Inc.* v. *N.L.R.B.*, 550 F.2d 1292 (1977); and *N.L.R.B.* v. *Billen Shoe Co., Inc.*, 397 F.2d 801 (1968). Additionally, the Board's reconsideration of the *Quality Broadcasting* decision was made in the light of *Wright Line*.

The Board's reconsideration of *Quality Broadcasting* resulted in issuance of a Supplemental Decision and Order. Therein, the Board concluded at footnote 4 that case was "essentially a pretext case, i.e., one in which the Employer's defense of business justification is found to be without merit. The General Counsel presented a *prima facie* case that the discharge . . . was unlawfully motivated . . . . Although Respondent attempted to demonstrate that it discharged [the discriminatee] because of poor work performance, it was unable to present convincing evidence in support of that defense." Further, the Board concluded "although the instant case is a pretext case, not a dual motivation case, we find that under any analysis Respondent's discharge . . . violated . . . the Act." In so concluding, the Board noted that the tests applied both by the Board and its Administrative Law Judge were consistent with the First Circuit pronouncements of the applicable standard to be used in the type of issue presented in *Quality Broadcasting*. The Board further observed that its *Wright Line* test places a greater burden of proof on the General Counsel than is required by *Mt. Healthy*. The Board stated, at footnote 5 in *Quality Broadcasting*, that the First Circuit "appeared to have moved away from the 'dominant motive' test towards adoption of the test outlined in *Mt. Healthy*."

The First Circuit recently had another occasion to consider the motivational issue in 8(a)(3) cases. Thus, in *Wyman-Gordon Company* v. *N.L.R.B.*, 654 F.2d 134, 141 (1981), a dual motive case, the court declared "the initial inquiry is whether the Board has made a *prima facie* showing that a "'significant" improper motivation' underlay the discharge decision." The court cited its decisions in *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1981), and *Statler Industries*, 644 F.2d 902, 905 (1981). Additionally, the court reiterated that the burden of proof shifts to a respondent to establish "that it had a good reason, sufficient in itself, to produce the discharge." *Ibid.* The court noted this shifting burden "does not impose an overall burden upon the Company to prove itself innocent of violating the statutes. Rather, the Company must come forward with evidence to the point where no longer does a preponderance of the evidence establish a violation." 91 LC at ¶18,174.

The composite of the foregoing decisional authority of the court and Board presents consistent views of the evidentiary burdens which are to be utilized in resolving the allegations of discrimination in the case at bar. My analysis, based thereon, appears below.

First, I conclude, in agreement with the parties, that the instant matter presents a pretext issue. As will be explicated below, the Employer's defense that Thone's purported "falsification" of DLPs in March 1980, together with his prior history of discipline, was a serious consideration and justification for his discharge is not convincing.

3. The General Counsel's *prima facie* case

a. *Protected activity*

The above-described findings of fact show that Thone had been, at all material times, engaged in protected union activity which consisted of grievance filing and processing, and of advising employees of their collective-bargaining rights. No further discussion of this *prima facie* element is necessary. I find this ingredient of the General Counsel's present herein.

b. *Knowledge*

The record contains ample evidence of this *prima facie* element. Indeed, it is undisputed. The Employer admits it was fully aware of Thone's grievance activities. Moreover, DiPirro's April 9 letter and his "lecturing" of Thone over looking for things upon which to file grievances demonstrate his awareness of Thone's counseling other employees regarding their collective-bargaining rights.

c. *Antiunion motivation*

I conclude that there is substantial direct and circumstantial evidence of unlawful motivation. Such evidence consists of:

(1) The variety of DiPirro's expressions of hostility toward Thone's exercise of protected activities. These expressions are: the December 17 remark to Thone that the Employer would "get" him made in the context of asking Thone to withdraw the Schau grievance; the December 17 request to Greenberg to have Thone knock off the "b— s—," concerning his counseling activities; the "lecturing" of Thone not to look for matters over which to file grievances.[19]

(2) Topjian's comments to Morrison that "we have to get the b—" and that Thone was a "pain in the a—." These statements are illuminating. They provide a nexus for evaluating the true causation of Thone's discharge. Apparently, Topjian's principal contact with Thone was through the grievance procedure. Topjian was intimately acquainted with Thone's activity in that connection. Topjian regularly worked in the Canton home office, separated from Thone. Thus, the profane references to Thone reasonably are equated with, and demonstrate, Topjian's dislike of Thone's protected activities.

(3) DiPirro's instructions to Morrison to insert DiPirro's detrimental conclusions about Thone into the audit report. I conclude that DiPirro's intervention is indicative of the depth of his animosity toward Thone resulting from the latter's protected activities. I recognize the possibility that DiPirro's hostility may be considered based purely upon personality differences between him and Thone. This is particularly true in context of having been overruled on grievance dispositions twice by Topjian. However, the record in its entirety shows Thone had been persistent in his protected activity. It was, therefore, in this setting that DiPirro's animosity nurtured. DiPirro's state of mind regarding Thone was directly related to Thone's protected activity. In such circumstances, his animus assumes a proscribed effect. See *Magnetics International, Inc.*, 254 NLRB 520 (1981).

(4) Thone's April 20 threat of discharge which has been found to constitute a violation of Section 8(a)(1). Such unlawful conduct strongly supports a finding of unlawful motivation.

(5) DiPirro grossly exaggerated the documentation supporting his April 9 discharge recommendation. DiPirro's letter, forwarding the audit report, related more than the alleged "falsification." He included a reference to customer MacDonald and then claimed he could "substantiate as many as 15 or 20 additional" identical cases. The quoted language is conjectural on its face. No documentation was provided.

DiPirro then set forth his generalized conclusionary comment that the loss of customer Carbonneau's business was due to Thone's poor business practices and inattentiveness to customer service. However, DiPirro provided no specific support for this characterization of Thone's work habits.

The April 9 letter referred to more than a dozen customer complaints made to Stankard over Thone's demeanor. No specific information attended this generalized observation.

DiPirro enclosed a *single* page from Thone's collection book to support his generalized claim that Thone was ignoring company procedures. In my view, such selective action tends to support a conclusion that DiPirro was attempting to distort circumstances against Thone.

DiPirro then reminded Topjian of Thone's disciplinary history. I will conclude, *infra*, this history could have played no operative part in the decision to discharge Thone. Accordingly, this historical reference is viewed as an element of exaggeration.

Finally, DiPirro's April 9 letter contains what is, perhaps, the most revealing bit of exaggeration and evidence of unlawful motivation. That reference is to Thone's advice to new agents not to write policies for friends and relatives. I have earlier noted that the casting of Thone's advice in terms unflattering to the Employer was DiPirro's abberration, pure and simple. His investigation of the incident was shallow. To have included his conclusions based upon it is strong evidence of the length to which DiPirro would go to rid himself of Thone.

In sum, I conclude that the totality and tenor of DiPirro's April 9 letter shows DiPirro harbored animus against Thone's protected activities and provides a reasonable basis for an inference that the discharge recommendation was discriminatorily motivated.

Upon all the foregoing discussion concerning the element of motivation, I conclude that the General Counsel has satisfied his burden.

4. The Employer's defense

I conclude that the Employer's defense does not withstand scrutiny. It is true there is no evidence that the Union enjoyed less than harmonious relationships with the Employer. There is no evidence the Employer has a proclivity to violate the Act. Nonetheless, these factors

[19] In this connection, I find no cogent evidence that Thone's activities disrupted the Employer's operations. There is only DiPirro's bare assertion to that effect.

must be balanced against the credited evidence showing antipathy to Thone's protected activities.

Ostensibly, the Employer had good reason to discipline Thone. His previous offenses and disciplinary history might well support the subject discharge. However, as noted, the Employer's burden of proof requires a showing that it would have discharged Thone even if he had not been engaged in protected activity. I conclude that this burden has not been met.

(a) The Employer's reliance upon Thone's disciplinary history is not persuasive. Thone was *merely orally reprimanded* on November 16, 1971, for applying dividends without customer authorization. That offense was similar, if not identical, to that which the Employer asserts caused the instant discharge. The letter reporting the 1971 incident reflects that Thone had apparently signed a customer's signature to a dividend application request. Such activity is, at least, tantamount to a "falsification."

The February 1975 infraction involved a deficiency in Thone's accounts. He was explicitly warned that further violations would result in his "immediate termination." The March 1977, December 1979, and March 11, 1980, disciplines were imposed for Thone's failure to timely lapse policies. He was *only orally reprimanded* for the first such offense. The second two resulted in *written warnings*. These second and third warnings advised he would be suspended or terminated for future violations.

The above history shows the Employer long tolerated numerous breaches by Thone of his work obligations. Even repetitions of a particular offense (submission of lapses on time) were no more severely punished than by a written warning, although previous written warnings spoke of vulnerability to suspension or termination. Additionally, in 1971, Thone engaged in a "falsification" of sorts. At that time, that offense warranted only an oral reprimand.

I agree with the Employer that the disciplinary history is a most relevant factor herein. This is so because written rules and company policy do not exist. It may be argued that their absence justifies the Employer imposing whatever discipline it chooses, at any time and for any reason it selects, on a case-by-case basis. However true that may be, the Employer's actions must be evaluated in the light of all circumstances.

Thone was discharged twice. In 1974, his accounts showed a monetary deficiency. He could not explain that condition. In contrast, the instant discharge occurred over insertion of wrong DLPs on M cards. There is no showing the Employer suffered any financial loss. Thone's benefit would have been minimal—30 cents per week for 13 weeks! Moreover, Morrison's audit showed that eight of the nine customers were satisfied with the result of Thone's activity. Only one wanted the dividend application to be reversed. Finally, DiPirro's April 9 letter shows that the alleged misuse of funds actually had not occurred. Thus, the letter concludes, "I am not presently going to apply these dividends, as I believe by law we do not have the right to use them." Thus, it appears, without deciding, that Thone's 1980 offense was less egregious than that of 1971. The quoted words cast substantial doubt that the alleged "falsification" occurred at all.

Had Thone's discharge occurred in the absence of his apparently accelerated protected activities, there would be a basis for accepting the Employer's contentions. However, those protected activities, together with DiPirro's and Topjian's verbal reactions thereto, are critical intervening factors which impact upon the Employer's evidentiary burden. The various expressions of animus remove respectability from the claim that Thone was terminated for good cause. Rather, I conclude that they fortify the General Counsel's contention that the defense is pretextual.

(b) Daniels' denial that Thone's protected activity was not an element in the discharge is refuted by his demeanor and other circumstances. I have noted that Daniels was evasive in a critical area. Moreover, whatever value he provided the Employer is vitiated by the evidence that the Employer deviated from past practice in Thone's discharge. Regional managers have general authority to terminate employees. That authority was exercised as to Thone in 1974 by Longshaw. Nonetheless, it was Daniels, and not Regional Manager DiPirro, who effectuated the 1980 discharge.

The two agents who had been discharged by Daniels in 1978 and 1980 prior to Thone were terminated by him for patently more serious offenses. Thus, agent Keene had advised customers to withdraw their funds from permanent life insurance and agent LeGarde requested customers to surrender their policies for cash and apply such cash to policies with a competitor.

Daniels' termination of Thone, as an isolated event, presents only suspicious circumstances. However, compared to the nature of the offenses for which he personally earlier imposed discharge, there appears to be no reason for him to have become involved in Thone's case. Given the peremptory discipline authority of regional managers, it is not unreasonable to conclude that DiPirro's failure to impose Thone's 1980 discharge was based on special circumstances. I conclude herein that the Employer has not satisfactorily adduced evidence that such special circumstances existed. There is scant, if any, evidence to explain why it was Daniels who discharged Thone. It is reasonably inferable that the protected activities played a part in Daniels' discharge decision. Cf. *Fayette Cotton Mill*, 245 NLRB 428 (1979).

(c) The Employer has not proved that Thone's infraction was sufficient cause for discharge. The Employer contends it was not a common practice among agents to insert wrong DLPs on M cards.

All of the Employer's witnesses who alluded to this subject disclaimed knowledge that agents had engaged in this practice. However, the Employer produced no debit agents to testify on this issue. Thus, the Employer's proof rests upon credibility resolutions. I have credited Morrison's assertion that he inserted the wrong DLPs. Even though the Employer may have been ignorant of that fact, that Morrison engaged in such conduct diminishes the strength of the Employer's contentions to the contrary. There is a lack of credible evidence to sustain this aspect of the defense.

(d) There is no substance to the Employer's claim that there is no direct evidence of animus.

The credited evidence shows that DiPirro unlawfully threatened to discharge employees for filing grievances. Thus, I conclude that the Employer has not borne its burden in this respect.

The foregoing discussion convinces me that the Employer has not shown it had good reason, sufficient in itself, to discharge Thone. There is insufficient evidence effectively to rebut the General Counsel's *prima facie* case. That *prima facie* case, in its totality, leads me to conclude that the Employer's defense is a pretext. The various warnings of possible termination given to Thone throughout his employment cannot be considered mere rhetoric. Had each subsequent offense warranted termination, the Employer surely would have imposed that discipline. It is apparent that the Employer considered Thone's offenses, however slight, actionable only when accompanied by his pervasive protected union activity. On the state of this record, I find that DiPirro's and Topjian's expressed annoyance and resentment of Thone's accelerated grievance filing and counseling activities in his role as steward comprised the initial and motivating cause of his discharge. Thus, the General Counsel's burden of proof of causality has been satisfied.

Upon all the foregoing, I find that Thone was discriminatorily discharged as alleged in the complaint.

CONCLUSIONS OF LAW[20]

1. Boston Mutual Life Insurance Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Insurance Workers International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act when DiPirro, on April 20, told Leland Greenberg and Karen Greenberg that Thone would be discharged unless he stopped filing grievances.

4. By discharging Francis A. Thone on May 8, 1980, because he engaged in the protected union activities of filing grievances and counseling other employees in his role as office chairman, the Employer discriminated against employees in violation of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Employer violated Section 8(a)(3) and (1) of the Act I shall recommend it cease and desist from engaging in such conduct in the future and affirmatively take such action as will dissipate the effects of its unfair labor practices.

To remedy Thone's discriminatory discharge, the Order shall require the Employer to offer him immediate and full reinstatement to his former position of employment as debit agent in the Employer's Methuen, Massachusetts, office or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights, privileges, and benefits to which he was entitled, and to make Thone whole for any loss of earnings he may have suffered as a result of the discriminatory discharge, by payment of a sum equal to that which he would have earned, absent the discrimination, to the date of the Employer's offer of reinstatement. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Inasmuch as the record contains no evidence of a proclivity to violate the Act, I conclude that it is not necessary that the Order contain broad proscriptive language. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). However, the Employer shall be ordered to refrain from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

Upon the above findings of fact, conclusions of law, the entire record of this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, Boston Mutual Life Insurance Company, Methuen, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to discharge employees unless they stop filing grievances.

(b) Discharging any of its employees because they engage in union activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of any of the rights guaranteed them in Section 7 of the act:

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to Francis A. Thone to his former position as debit agent in the Methuen, Massachusetts, office or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights, privileges, and benefits; and make him whole in the manner prescribed above in the section entitled "The Remedy" for any loss of pay or other benefits suffered by reason of his discharge on May 8, 1980.

(b) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

[20] In view of the Conclusions of Law set forth below, the Employer's written motion to dismiss is denied in its totality.

[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Post at its Methuen, Massachusetts, location copies of the attached notice marked "Appendix."[22] Copies said notice on forms provided by the Regional Director for Region 1, after being duly signed by an authorized representative of the Employer shall be posted by the Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Goverment

After a hearing in which all parties were represented by their attorneys and were given the opportunity to present evidence in support of their respective positions, it has been found that we violated the National Labor Relations Act, as amended, in certain ways and we have been ordered to post this notice and to carry out its terms.

The Act gives all employees the following rights:

To organize themselves into labor organizations
To form, join, or support unions
To bargain as a group through a representative they choose
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activities except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

In recognition of these rights, we hereby notify you that:

WE WILL NOT threaten to discharge any of you because you file grievances.

WE WILL NOT discharge any of you because you engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of any of the rights described above.

WE WILL offer Francis A. Thone immediate and full reinstatement to his former position with us as a debit agent in our Methuen, Massachusetts, office or, if that position no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights, privileges and benefits; and WE WILL make him whole, with interest, for all loss of earnings resulting from his discharge on May 8, 1980.

BOSTON MUTUAL LIFE INSURANCE COMPANY